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No. _____

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In The

# Supreme Court of the United States

October Term, 1987

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PETER EVICH; ESTATE OF OGIE BERG,

*Petitioners,*

v.

TERRY MORRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. CONNELLY, et al.,

*Respondents.*

—o—

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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## QUESTIONS PRESENTED

1. Whether a survival action exists under the general maritime law, and, if so, should the measure of damages recoverable under that action be identified through use of criteria congruent with those established by this Court for identification of the damages recoverable under the general maritime law wrongful death action first recognized in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970)? If the criteria must be congruent, should the maritime law survival action afford damages for a decedent's hypothesized post-mortem economic loss?

2. Whether the general maritime law survival action should provide a recovery of damages for a deceased seaman's post-mortem economic loss to the decedent's surviving, non-dependent siblings, through his estate, when those damages are ordinarily compensable only through a wrongful death action that the surviving siblings do not qualify to bring on their own behalf under the Jones Act, 46 U.S.C. § 688 or the general maritime law, the sole sources of action otherwise available to them?

## PARTIES TO THE PROCEEDING

Petitioners are Peter Evich and the Estate of Ogie Berg. Respondents are John J. Connelly and Terry Morris, acting as personal representatives of the Estate of Robert J. Connelly.

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The petitioners Peter Evich and the Estate of Ogie Berg respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered June 10, 1987.

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## OPINIONS BELOW

The opinion of the court of appeals identifying post-mortem earnings as an item of damages compensable under the maritime law survival action (App., *infra*, 1a) is at the time printing not yet reported. The opinion of the trial court awarding damages (App., *infra*, 6a) prior to reversal by the court of appeals is unreported. The opinion of the court of appeals recognizing the existence of a maritime law survival action, and remanding to the trial court for determination of damages recoverable under the action (App., *infra*, 9a), is reported at 759 F.2d 1432. A companion opinion of the court of appeals, not concerned with the maritime law survival action, is reported at 759 F.2d 1425.

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## JURISDICTION

The judgment of the court of appeals was filed on June 10, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Article III, sec. 2 of the Constitution provides that the judicial power vested in the Supreme Court under Article III, sec. 1 extends to "all cases of admiralty and maritime jurisdiction . . ."

## STATUTES INVOLVED

The federal statutory provision directly involved is the Jones Act, 46 U.S.C. 688 (App., *infra*, 14a). The Jones Act, by express incorporation of the Federal Employers' Liability Act (FELA) 45 U.S.C. 51-59, brings into issue sections 51 and 59 of the FELA (App., *infra*, 14a-15a).

The survival statutes of the states and trust territories, in their various forms, are unanimously involved (App., *infra*, 17a-41a).

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## STATEMENT

This case concerns the items of damages—particularly hypothesized post-mortem earnings of a decedent—ostensibly recoverable under a maritime law survival action currently recognized to exist in a majority of the circuit courts. Prior to the decision of the court of appeals below, no circuit court had awarded damages for post-mortem economic loss to a decedent's estate under the maritime law survival action; a majority of state survival statutes and the Jones Act, 46 U.S.C. 688, preclude such a recovery. The events culminating in the most recent decision of the court of appeals in this matter are recounted below. The bases of jurisdiction in the trial court were 28 U.S.C. 1333, 46 U.S.C. 181 *et seq.*, FRCP 9(h), and the general maritime law.

1. On March 29, 1980, the F/V CAPELLA capsized and sank inside Alaskan territorial waters. Robert J. Connelly, together with three of the four remaining crewmembers, drowned. Robert J. Connelly's sole survivors were three non-dependent older brothers.

2. A wrongful death action was commenced against petitioners in Alaska superior court on behalf of the decedent's surviving brothers; a collateral survival action was commenced on behalf of the decedent's estate (App., *infra*, 10a). The Alaska proceeding was stayed following petitioners' commencement of a limitation of liability proceeding in the U.S. District Court for the Western District of Washington; this limitation proceeding was consolidated for trial with a second limitation proceeding pending in the Western District of Washington, *Berg v. Chevron* (App., *infra*, 10a). During trial, petitioners successfully moved to dismiss for failure to state a claim, arguing that the decedent's surviving brothers lacked standing to maintain a wrongful death action. The decedent's estate moved for reconsideration, and was awarded a recovery against Chevron, but not against petitioners (App., *infra*, 10a). The award consisted of $25,000.00 for the decedent's pain and suffering and $239,439.00 for unspecified economic loss (App., *infra*, 2a).

3. *First appeal and remand.* The court of appeals reversed and vacated the award against Chevron (App., *infra*, 12a). The court of appeals affirmed the trial court's dismissal of the wrongful death claims against petitioners, but separately recognized a survival action to exist under the general maritime law based on *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (App., *infra*, 13a). The court of appeals remanded to the trial court for consideration of the damages recoverable under the maritime law survival action (App., *infra*, 13a).

On remand, petitioners successfully moved for summary judgment concerning the nature of the damages re-

coverable under the maritime law survival action. The trial court restricted damages to the decedent's pain and suffering and funeral expenses, noting generally that "recovery in a survival action is limited to the damages suffered between injury and death." (App., *infra*, 7a). The trial court expressly declined to award damages for the decedent's hypothesized post-mortem earnings, which the decedent's estate sought in accord with the Alaska survival statute, and observed as follows:

> "If this court adopted the position of claimants, then the type of damages recoverable in a federal survival suit would depend upon the location in which the cause of action arose. Accordingly, if the cause of action arose in territorial waters, a federal court would look to a particular state's survival law. If the cause of action arose in international waters, federal courts would be forced to develop a separate body of law regarding the type of damages recoverable. The end result would amount to a haphazard body of law. This is certainly not constant with the principles of uniformity relied upon so heavily in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). The same principles of uniformity that guided the *Moragne* Court in fashioning a wrongful death action under the general maritime law should guide this court in determining the type of damages recoverable in the instant case." (App., *infra*, 7a).

The trial court also rejected the argument, as did the court of appeals, that Alaska state law should supplement remedies available under the general maritime law (App., *infra*, 3a, 8a).

4. *Second appeal.* The court of appeals reversed the trial court's ruling on recoverable damages, in what the court of appeals regarded to be a case of first impression

among the circuits (App., *infra*, 3a). The court of appeals found that, in addition to the damages awarded by the trial court, further consideration should be given to damages for the decedent's hypothesized post-mortem earnings, punitive damages, and prejudgment interest. (Petitioners are, by the opinion of the court of appeals, currently liable for damages respecting post-mortem earnings, since the trial court has already established the law of the case concerning the decedent's hypothesized post-mortem economic loss) (App., *infra*, 2a).

The court of appeals observed that the majority of states do not allow post-mortem earnings as an item of survival damages, and that the Jones Act, 46 U.S.C. 688, likewise proscribes recovery of such damages via a survival action. The court of appeals nonetheless found that the maritime law survival action would include post-mortem earnings as an item of damages because that result would "'better (become) the humane and liberal character of proceedings in admiralty.'" (App., *infra*, 4a).

5. Pending submission of the instant petition, petitioners moved the court of appeals for a stay of mandate. The motion was denied.

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## REASONS FOR GRANTING THE PETITION

The court of appeals found that the maritime law survival action affords damages for a decedent's hypothesized post-mortem earnings.[1] The court of appeals none-

1 The court of appeals also found that recovery might be had for punitive damages and prejudgment interest, in addition to the damages awarded by the trial court for pain and suffering and funeral expenses (App., *infra*, 2a).

theless acknowledged that post-mortem earnings are not recoverable under a majority of state survival statutes or under the Jones Act, 46 U.S.C. 688, the sole federal survival statute applicable to maritime causes.[2] The court of appeals' disregard of the sentiments of a majority of the states, and of Congress, illustrates that the court of appeals ignored the explicit criteria established by this Court for the purpose of identifying items of damages recoverable under the general maritime law. Review should be granted because the ruling of the court of appeals on this issue, in a self-styled case of first impression among the circuit courts, interjects a novel and tangible source of uncertainty into the maritime law; this uncertainty is anathema to the constitutionally-based interest of this Court in preserving the uniformity of the maritime law, and to the continued integrity of the criteria established by this Court for purposes of preserving that uniformity of law. The decision of the court of appeals is additionally in material conflict with the decisions of several of the other circuits.

This Court has not presently recognized a survival action to exist under the general maritime law.[3] This Court

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2 The operative "survival" provision of the Jones Act is found in section 59 of the Federal Employer's Liability Act, 45 U.S.C. 51-59, which is incorporated by reference into the Jones Act. (App., *infra*, 15a).

3 The Court rejected the existence of a maritime law survival action in its most recent consideration of the question. *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932). A maritime law survival action has been recognized to exist, however, in the following decisions of the circuit courts of appeal: *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v.*

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has, however, clearly enunciated the criteria to be used in refining maritime law remedies, most notably in regard to the maritime law wrongful death action recognized in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970). These criteria should, by logic and established principles of law, control efforts to refine the damages schedule of the maritime law survival action since that action is founded on *Moragne*. The decision of the court of appeals expressly violates these criteria in the following several respects, each representing error that necessitates review by this Court: (1) the decision places the maritime law survival action at odds with its counterpart death action both in regard to their construction and effect, significantly impairing uniformity of law; (2) the decision expressly disregards the counsel of the majority of the states and Congress, whose combined judgment on questions of maritime remedies this Court has found to be of controlling influence; and (3) the decision has its departure from the norm predicated on the "humane and liberal" character of admiralty proceedings, a reliance erroneously invoked where the decedent seaman is survived solely by older, non-dependent siblings.

These three points of error warrant review by this Court, and are examined in turn.

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*Drummond*, 507 F.2d 794 (1st Cir., 1974). A survival recovery has been sanctioned under the auspices of the maritime law in the following decisions among the circuits: *Spiller v. Thomas M. Love, Jr. & Assoc.*, 466 F.2d 903 (8th Cir. 1972); *Green v. Vantage S.S. Co.*, 466 F.2d 159 (4th Cir. 1972). The Third Circuit appears to continue using state law to supply survival recoveries in maritime causes. *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386 (3rd Cir., 1971). But *cf. Ward v. Union Barge Line Corp.*, 443 F.2d 565, 569 (3rd Cir. 1971) (suggesting that a maritime law survival action might exist based on *Moragne*.)

1. This Court recognized in *Moragne* that refinement of the maritime law wrongful death action should be undertaken with reference to state and federal wrongful death legislation. 398 U.S. at 405-06. This legislation was specifically promoted for "persuasive analogy" in regard to refinement of the damages schedule of the maritime death action. *Id.* at 408. Later decisions of this Court have unequivocally honored *Moragne's* mandate in regard to damages, restricting recoverable damages in a maritime wrongful death action to specific items otherwise recoverable under a majority of state statutes and/or congressional enactments. *See, e.g., Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 584-87 (1974) (loss of support, loss of services, loss of society, respectively available "universally" among the states and through applicable federal legislation, among an "overwhelming" number of states and through applicable federal legislation, and among a "clear majority" of states); *Mobil Oil Corp. v. Higginbotham,* 414 U.S. 618 (1978) (damages for loss of society as available under *Gaudet* not recoverable on the high seas due to conflict with pecuniary restriction on damages recoverable under the Death on the High Seas Act, 46 U.S.C. 761-68); *American Export Lines v. Alvez,* 446 U.S. 274, 284 (1980) (loss of society for spouse of injured seaman, consistent with a "clear majority" of states—41 plus the District of Columbia). The lower courts have followed the above parameters in restricting survival damages to antemortem losses—consistent with the Jones Act and most state survival statutes. *See, e.g., Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890, 893 (5th Cir., 1984) (maritime law survival action permits "recovery of a decedent's pre-death damages"). Significantly, only the

decision of the court of appeals in the instant case recognizes any item of damages except antemortem pain and suffering. In fact, this Court has recently suggested that survival damages in admiralty proceedings, even where recovered pursuant to state statutes, are restricted in scope to the decedent's antemortem pain and suffering. *Offshore Logistics, Inc. v. Tallentire,* 91 L.Ed. 2d 174, 185 (1986).

The criteria established by this Court for refinement of the maritime law death action apply perforce to refinement of the maritime law survival action. Each lower court recognizing the maritime law survival action has noted *Moragne* to be the genesis of the action. *See, e.g., Evich v. Connelly,* 759 F.2d 1432, 1434 ("there is no bar to maritime survival actions based on *Moragne*"); *Barbe v. Drummond,* 507 F.2d 794, 799 (1st Cir., 1974) (maritime law survival action has basis in "decisional law," citing to *Moragne*); *Azzopardi v. Ocean Drilling & Exploration Co.,* 742 F.2d 890, 893 (5th Cir., 1984) ("after *Moragne,* numerous decisions of this and other circuits have recognized that under the principles announced in that decision, the general maritime law includes a survival action . . ."). In addition to the recognized link between *Moragne* and the maritime law survival action, two other reasons impel reference to state and federal survival legislation: (1) survival statutes represent the only existing reference from which the courts may obtain guidance; and (2) the circumstances that compelled the *Moragne* Court to recognize a maritime law wrongful death action are common to the availability of survival remedies in maritime causes before *Moragne,* such that the policies expressed in *Moragne* are directly applicable to questions of survival.

No survival action existed at common law, just as there existed no wrongful death action. S. Speiser, *Recovery for Wrongful Death* (2nd Ed. 1975) § 1:2-4. In order to provide either remedy in an admiralty cause, therefore, the admiralty courts necessarily employed existing state and federal legislation. The *Moragne* Court primarily recognized a maritime law wrongful death action to exist in order to alleviate the confusion and inconsistency resulting from application of disparate state and federal death statutes to causes that were factually similar except for the loci of their origins. 398 U.S. at 401-02 ("our recognition of a right to recover for wrongful death . . . will assure uniform vindication of federal policies, removing the tension and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts"). Confusion and inconsistency identical to that redressed by the *Moragne* Court is found in application of survival statutes to maritime causes; just as with the pre-*Moragne* use of state death statutes, innumerable conflicts arise concerning conflicts of law, proper state jurisdiction, legislative intention for maritime application of statutes, and the like. *See generally Offshore Logistics, Inc. v. Tallentire*, 477 U.S. —, 912 L.Ed. 2d 174, 182-84, 194-95 (1986); Nagy, Non-Dependent Beneficiaries in Wrongful Death Actions Under the General Maritime Law: How Far Has *Moragne* "Sifted"?, 17 J.Mar.L. & Comm. 33, 37-39 (1986) (as to wrongful death statutes); Comment, The Application of State Survival Statutes in Maritime Causes, 60 Col.L.Rev. 534, 541 (1960) (as to survival statutes).

Because *Moragne* and its progeny establish clear criteria to be employed in determining the schedule of dam-

ages recoverable under the maritime law survival action, it is also clear that the court of appeals totally disregarded these criteria in finding that a decedent's hypothesized post-mortem earnings are a proper item of survival damages. This disregard places into jeopardy the very integrity of the criteria, as no distinction can be drawn as to why their application should vary between wrongful death actions and survival actions maintained under the general maritime law. The logical dilemma posed by such variable application of the criteria is easily illustrated. Damages for future economic loss are recognized by the court of appeals to be recoverable in most states and under the Jones Act "in the form of loss of support when wrongful death beneficiaries exist." The court of appeals then notes that if such beneficiaries don't exist, the estate can be compensated for the loss without problems of double recovery (App., *infra,* 4a). The court of appeals fails to recognize that wrongful death beneficiaries and survival beneficiaries are often very different, and no provision is made for relative prioritization of their claims to lost future earnings—particularly when variant provisions of testacy, intestacy, and the like are considered. Additionally, beneficiaries for the maritime law death action are identified in accord with *Moragne's* advices; if the beneficiaries of the maritime survival action are to be similarly identified, the courts must take due notice of an *exact* non-estate schedule of survival beneficiaries under the Jones Act, while most states seem to favor an estate recovery—leaving unresolved even the *source* of resolution for the conflict of prioritization. Finally, it is notable that the states and the Jones Act are able to resolve questions of prioritization by distinct legislative provision; the court

of appeals made no such effort as it took no counsel from either source.

In summary, the court of appeals disregarded established criteria for refining the damages schedule of the maritime law survival action, thus disassociating that action from its principled origin and the stated interest of this Court in preserving the uniformity of the maritime law. Review should be granted.

2. The decision of the court of appeals concerning post-mortem earnings places the damages schedule of the maritime law survival action in direct conflict with the common policy underlying the survival statutes of a clear majority of the states, and of the Jones Act. Furthermore, the decision in this regard distinguishes the damages recoverable under the maritime law survival action from the damages recoverable under those same survival statutes and the Jones Act. As a result of the differences thus engendered between the maritime law survival action and most other survival statutes, the exact character of which is outlined in the following discussion, survival recoveries in maritime matters will now commonly be incongruent with land-based survival recoveries for no apparent reason. Additionally, if the maritime law survival action is considered to be available only to seamen,[4] the action will

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4 Whether the maritime law wrongful death action (and by logical association, the maritime law survival action) is available only to seamen appears to be a matter of some dispute. In each of the Court's decisions concerning the maritime law wrongful death action, seamen have been the source of the action considered, and discussion of liability, where provided, has centered on vessel owners' warranty of seaworthiness to seamen. Only seamen are entitled to this warranty. *Mitchell v. Trawler*

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be at odds with survival recoveries made on behalf of the estates of non-seamen decedents killed within state territorial waters, and under the laws of several of the states that consider their survival statutes to be applicable to high seas incidents of death, to recoveries of non-seamen decedents killed on the high seas. *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. —, 91 L.Ed. 2d 174, 184-85 n.1 (1986). (This Court withholding address of whether a wrongful death recovery under the Death on the High Seas Act, 46 U.S.C. 761-68, could be "supplemented by a recovery for the decedent's pain and suffering under the survival provision of some conceivably applicable state statute that is intended to apply on the high seas."). Quite apparently, the decision of the court of appeals does harm to the paramount interest of this Court in uniformity of the maritime law, and to the logic of that law in view of existing legislative precedent, and review should be granted.

The decision of the court of appeals extends recovery under the maritime law survival action far beyond

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*Racer, Inc.*, 362 U.S. 539 (1960); *But, cf American Export Lines, Inc.*, 446 U.S. 274, 280-81 (1980) (stating that the general maritime law provides remedies to certain harbor workers, suggesting that certain seamen "pro hac vice" may still be recognizable pursuant to *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), despite the 1972 amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, expressly abrogating seaworthiness as a basis of action for an injured harbor worker against a vessel owner). The lower courts differ in their perceptions of the bases of liability for the maritime death action. Some courts see both unseaworthiness and negligence as bases of liability, the latter conceivably available to non-seamen. *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir., 1980); *Law v. Sea Drilling Corp.*, 523 F.2d 293, 296 (5th Cir., 1975). Other courts see unseaworthiness as an apparent exclusive basis of liability, such that only seamen could benefit by a maritime law death or survival action. *Ford v. Wooten*, 581 F.2d 712, 714-17 (11th Cir., 1982).

the limits of the logical policy objective of a survival action, which, in the perception of most states and the Congress, is to afford redress for "[C]laims for physical injury, pain and suffering and loss of wages prior to death which existed in favor of the injured person." *Abbot v. United States,* 207 F.Supp. 468, 472 (S.D. N.Y. 1962) (construing state law). *See also Chute v. United States,* 466 F.Supp. 61-63 n.2 (E.D. Mass. 1978) ("wages, medical expenses . . . pain and suffering of a decedent (sustained) between the time of injury and death; construing state law); *St. Louis I.M.&S. R. Co. v. Craft,* 237 U.S. 648, 657-58 (1915) (survival provision of § 59 of the FELA —and thus the Jones Act—is "a right recovering his loss and suffering while he lived, but taking no account of his premature death or of what he would have earned or accomplished in the natural span of life . . ."). As the referenced authorities indicate, the usual objective of a survival action is solely to compensate a decedent, through his or her estate, for losses *personally* sustained by the decedent prior to death; damages are, consequently, logically restricted to those accruing between the time of injury and death. S. Speiser, *Recovery for Wrongful Death* (2nd Ed. 1975) § 14:6 at 423-24.

The "personal" loss aspect of the survival action is what distinguishes it from a wrongful death action, the latter being designed to provide redress to a decedent's survivors for their losses on account of the death. *Id.* § 14:1 at 407; *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 575 n.2 (1974). The decision of the court of appeals, in finding hypothesized post-mortem earnings to be recoverable, in effect makes an award to the decedent of damages that he never incurred, and provides a "wind-

fall" to his survivors in the instant case solely because they did not qualify to bring a wrongful death action on their own behalf. *Cf.* Comment, *The Application of State Survival Statutes in Maritime Causes*, 60 Col.L.Rev. 534, 552 (1960). *See also*, 1 Am.Jur.2d *Abatement, Survival and Revival* § 51 at 87 (1962). Additionally, the decision of the court of appeals is at odds with the views of other circuit courts on the character of damages recoverable under the maritime law survival action, the other circuit courts adopting the normative antemortem restriction present in most states and the Jones Act. *See e.g. Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir., 1984) (maritime law survival action exists, "permitting recovery of a decedent's predeath damages"), *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir., 1974) (maritime law survival action exists to compensate "for pain and suffering prior to death").

The illogical consequence of the court of appeals' decision in regard to the "windfall" nature of the recovery thus occasioned is fully addressed in the following section. It is important to note, however, that the court of appeals has fashioned a remedy that affords damages for no reason connected with the purpose of the action itself; the law does not favor actions or remedies without purpose, and review should be granted.[5]

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5 The court of appeals perceived no problem in having the decedent's estate recover damages for lost earnings, even though those damages would undoubtedly go to the decedent's surviving non-dependent siblings, because no danger of "double recovery" existed whereby damages of the same character would have been received by wrongful death beneficiaries.

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3. The court of appeals apparently found damages for post-mortem earnings to be recoverable for one reason: that it "better (became) the humane and liberal character of proceedings in admiralty," *quoting Moragne*, 398 U.S. at 387. The court suggested as a corollary that its finding would prevent rewarding a petitioner "for killing his victim rather than injuring him", quoting *Moragne* at 395 (App., *infra*, 4a). The court of appeals misapplies the humane character of admiralty proceedings when the application benefits not the decedent seaman but his surviving, non-seaman, non-dependent siblings. Additionally, the function of a civil remedy is to compensate, and not to punish, as intimated by the court of appeals. Both of the reasons cited by the court of appeals in support of awarding damages for post-mortem earnings are, therefore, invalid and merit review by this Court.

This Court recognized in *Moragne* that the maritime law wrongful death action was designed out of a "special solicitude" for seamen and their dependents. 398 U.S. at 387. This "solicitude" has remained the fulcrum from which this Court has endeavored to refine the constituent elements of the action. *Cf. Sea-Land Services Inc. v. Gaudet*, 414 U.S. 573, 577 (1974) ("Our approach to res-

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(App., *infra*, 4a). The court of appeals discussed no reasons favoring *why* the surviving siblings, who admittedly had suffered no compensable personal loss on account of the decedent's death, and thus could not bring a wrongful death action on their own behalf, should *because* they suffered no such loss be able to collect the same type of damages available to them as if they had—only through an action designed to benefit the decedent seaman only.

olution of the issue before us must necessarily be consistent with the extension of this 'special solicitude' to the dependents of the seafaring decedent''). Therefore, while the general character of the maritime law death action has been guided by the "humane and liberal" character of admiralty proceedings, that character has been particularly oriented to the benefit of seamen and their dependents.

The court of appeals has cited this policy in support of a damage award that does not benefit the deceased seaman for losses that he incurred, nor his dependents, as there are none, but non-seamen, non-dependent relatives. The court of appeals' primary reason for finding post-mortem earnings a proper item of damages is therefore in error. The Sixth Circuit has in fact rejected just such use of the "humane and liberal" character of admiralty proceedings as a justification for awarding wrongful death damages to a decedent's estate, such that the decedent's survivors, who did not qualify to bring a wrongful death action in their own stead, might recover them through the estate—a question strikingly similar to that facing the court of appeals in the instant case. The Sixth Circuit initially observed that "the liberal and humanitarian character of maritime proceedings as expressed in *Moragne* and *Gaudet* contemplates solicitude for dependents, not inanimate estates." *In re Cambria S.S. Co.*, 505 F.2d 517, 523 (6th Cir., 1974), *cert. denied*, 430 U.S. 975 (1975). The Sixth Circuit went on to observe, in direct conflict with the apparent rationale of the court of appeals below, that "the mere accident of blood relationship with nothing more does not itself call for that special solicitude which the maritime law holds for those injured

within its jurisdiction." *Id.* at 524-25. The Sixth Circuit's views are in accord with the majority of the states and the Jones Act; the court of appeals in the instant case is in opposition to all of those sources, and review is therefore warranted.

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## CONCLUSION

The decision of the court of appeals is in conflict with the law of several of the circuits, with the compelling majority of the states and Congress, and with the constitutionally-based interest of this Court in preserving the uniformity of the maritime law. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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August 25, 1987

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 86-3587

PETER EVICH; ESTATE OF OGIE BERG, as owners of the M/V CAPELLA,

*Petitioners/Appellees,*

vs.

TERRY MORRIS, Personal Representative of the Estate of Robert J. Connelly, JOHN S. CONNELLY,

*Claimants/Appellants.*

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Filed June 10, 1987

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Before: James R. Browning, Eugene A. Wright and Cynthia Holcomb Hall, Circuit Judges.

Opinion by: Judge Wright

### OPINION

WRIGHT, Circuit Judge:

In this appeal we are asked to determine whether a general federal maritime survival action preempts state law, and what damages are recoverable in the federal action. We conclude that state law is preempted and that

future economic loss, punitive damages, and prejudgment interest may be recovered.

I.

This appeal follows previous remands in which we joined other circuits in recognizing a general federal maritime survival action. *Berg v. Chevron, U.S.A. Inc.*, 759 F.2d 1425 (9th Cir., 1985); *Evich v. Connelly*, 759 F.2d 1432 (9th Cir., 1985). The remand in *Evich* directed the district court to consider the maritime survival action against *Evich* and the Berg estate. 759 F.2d at 1434.

On remand, Evich and Berg moved for summary judgment, conceding liability. Judge Tanner granted the motion and entered judgment in favor of Connelly for $25,000.00. At the previous trial, he had awarded Connelly $264,439.00 against Chevron. Twenty-five thousand dollars of that award represented pre-death pain and suffering. The remainder was attributed to an unspecified economic loss.

II.

[1] Connelly's personal representatives argue that Alaska state law supplements federal maritime law when deaths occur in state territorial waters. When the same argument was made in the context of wrongful death actions, we rejected it. *Nelson v. United States*, 639 F.2d 469, 473 (9th Cir., 1980); *see also Matter of S/S Helena*, 529 F.2d 744, 748-53 (5th Cir., 1976). The parties have presented us with no reason to depart from *Nelson*. The need for uniformity in maritime survival actions is no less than the need for it in maritime wrongful death actions.

We adhere to *Nelson*, holding that state law is preempted by the general federal maritime survival action.

## III.

Connelly's representatives next claim Judge Tanner erred by limiting damages to pre-death pain and suffering. They argue that future economic loss, punitive damages, and prejudgment interest may be recovered in a federal maritime survival action. We agree.

Although federal circuit courts considering survival damages have generally stated that pre-death pain and suffering is compensable, *see, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir., 1984); *Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir., 1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc., Inc.*, 466 F.2d 903, 911 (8th Cir., 1972), the recoverability of future economic loss in a *post-Moragne* survival action has not been addressed by a circuit court. *Cf. Mascuilli v. United States*, 411 F.2d 867, 873 (3rd Cir., 1969) (pre-*Moragne* case allowing such recovery). The issue was addressed in *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F.Supp. 361 (W.D. Wash. 1974). There, Judge Beeks, relying on *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), allowed for future economic loss. *Id.* at 363.[1]

[2] While the majority of states do not allow future economic loss to be recovered in survival actions, and the

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[1]Petitioners attempt to undermine *Muirhead* by arguing that reliance on a state survival statute is no longer accepted practice. While Judge Beeks referred to the result under Washington law, he based his holding on a "survival remedy independent of state law." 378 F.Supp. at 363.

Jones Act provides for no such recovery, we find recovery here " 'better becomes the humane and liberal character of proceedings in admiralty' ", *Moragne*, 398 U.S. at 387 (citation omitted), and prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him, *see id.* at 395. Most states and the Jones Act allow these damages to be recovered in the form of loss of support when wrongful death beneficiaries exist. Where, as here, those beneficiaries do not exist, potential problems with double recovery do not exist. Under these circumstances, the decedent's estate should be compensated for loss of future earnings. *See Kriesak v. Crow*, 36 F. Supp. 127, 129 (M.D. Pa. 1940).

Claimants also seek punitive damages. Punitive damages are available under general maritime law for claims of unseaworthiness. *In re Merry Shipping, Inc.*, 650 F.2d 622, 625 (5th Cir., 1981); *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2nd Cir.), *cert. denied*, 409 U.S. 982 (1972), and for failure to pay maintenance and cure, *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048, 1051-52 (1st Cir., 1973). *See generally Protectus Alpha Navigation Co. Ltd. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir., 1985). While punitive damages are not available under the Jones Act, *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir., 1984), *cert. denied*, 471 U.S. 1136 (1985), it does not follow that they are unavailable under general maritime law. *In re Merry Shipping, Inc.*, 650 F.2d at 626.

[3] Punitive damages serve the purposes " 'of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.' "

*Protectus Alpha Navigation Co. Ltd.*, 767 F.2d at 1385 (quoting Prosser, *The Law of Torts* § 2 at 9 (1971)). These purposes support their availability in general maritime law and the trend is to allow such recoveries. 2 M. Norris, *The Law of Seamen* § 30:41 at 517 (4th Ed. 1985); *cf. Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 62-63 (2nd Cir., 1985) (not available in contract). We find that punitive damages are available in a general maritime survival action upon a showing of "conduct which manifests 'reckless or callous disregard' for the rights of others, . . . or 'gross negligence or actual malice criminal indifference.' " *Protectus Alpha Navigation Co. Ltd.*, 767 F.2d at 1385 (citation omitted). It is for the trier of fact to determine whether they are warranted. *See in re Merry Shipping, Inc.*, 650 F.2d at 626-27. Judge Tanner should do so on remand.

[4] Also, " 'prejudgment interest must be granted unless peculiar circumstances justify its denial.' " *Vance v. American Hawaii Cruises, Inc.*, 789 F.2d 790, 795 (9th Cir., 1986) (quoting *Dillingham Shipyard v. Associated Insulation Co.*, 649 F.2d 1322, 1328 (9th Cir., 1981)). We reject petitioner's argument that peculiar circumstances justifying its denial are so obvious as to preclude the need for a remand. The general maritime survival action was not novel, and the argument that the death of the wronged party justifies denial of such an award defies reason. Judge Tanner must award prejudgment interest on remand or specify the peculiar circumstances justifying its denial.

REVERSED and REMANDED.

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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No. C82-21T

PETER EVICH and the ESTATE OF
OGIE BERG, as owners of the
M/V CAPELLA,
Petitioners,

vs.

JOHN J. CONNELLY and TERRY MORRIS,
Personal Representative
of the Estate of Robert J. Connelly,
Claimants.

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THIS MATTER comes on before the above-entitled Court upon Petitioner's Motion for Summary Judgment.

Having considered the entirety of the records and file herein, the Court finds and rules as follows:

1. The instant matter involves the damages recoverable by claimants in conjunction with the survival action of Robert J. Connelly. Specifically, this Court is faced with the issue of whether or not future economic losses are recoverable in a maritime survival action.

2. This Court finds that there are no genuine issues of material fact present in this matter and that judgment can be entered as a matter of law.

3. Robert J. Connelly died in the territorial waters off the Alaskan coast.

4. Claimants are entitled to maintain a survival action under the general maritime law. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970); *Evich v. Connelly*, 759 F.2d 1432 (9th Cir., 1985).

5. Generally, recovery in a survival action is limited to the damages suffered between injury and death. *Chute v. United States*, 466 F.Supp. 61 (1978). Claimants seek to extend this general rule by adopting Alaska State law, which allows for recovery of future economic loss in a survival action.

6. If this Court adopted the position of claimants, then the type of damages recoverable in a federal survival suit would depend upon the location in which the cause of action arose. Accordingly, if the cause of action arose in territorial waters, a federal court would look to a particular state's survival law. If the cause of action arose in international waters, federal courts would be forced to develop a separate body of law regarding the type of damages recoverable. The end result would amount to a haphazard body of law. This is certainly not consistent with the principles of uniformity relied upon so heavily in *Moragne v. States Marine Lines*, 398 U.S. 395 (1970). The same principles of uniformity that guided the *Moragne* court in fashioning a wrongful death action under the general maritime law should guide this court in determining the type of damages recoverable in the instant case.

7. This court finds that claimants are not entitled to recover for the future economic losses incurred by Robert J. Connelly.

8. Claimants are, however, entitled to recover for the conscious pain and suffering of Robert J. Connelly which this court has previously determined to be $25,000.00. In addition, claimants are entitled to recover the funeral and burial expenses incurred.

9. Claimants are precluded from recovering future economic loss under the theory of pendent jurisdiction. *Nelson v. United States*, 639 F.2d 469 (9th Cir., 1983); *Bodden v. American Offshore, Inc.*, 681 F.2d 319 (9th Cir., 1982).

Therefore, it is hereby

ORDERED that Petitioner's Motion for Summary Judgment is GRANTED; it is further

ORDERED that the decedent, Robert J. Connelly, is awarded $25,000.00 for his antemortem pain and suffering; it is further

ORDERED that the decedent, Robert J. Connelly, is awarded the costs of the funeral and burial expenses already incurred; and it is further

ORDERED that the above entitled action is DISMISSED.

The clerk of the court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this *13th* day of January, 1986.

United States District Judge,
Jack E. Tanner

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 84-4106

PETER EVICH; ESTATE OF OGIE BERG,
as owners of the M/V CAPELLA,
Petitioner/Appellees,

vs.

JOHN S. CONNELLY and TERRY MORRIS,
Personal Representatives
of the Estate of Robert J. Connelly,
Claimants/Appellants.

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Decided May 9, 1985

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Before: WRIGHT, KENNEDY, and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This appeal arises from the maritime accident in *Berg v. Chevron,* 759 F.2d 1425, decided today. The events leading to the Connelly claim are set out in the *Berg* opinion. The legal issues in the two cases are distinct, though they arise from the same facts.

## ADDITIONAL FACTS

The Estate of Robert Connelly filed a wrongful death action against the owners of the CAPELLA, Peter Evich and the estate of Ogie Berg. The action was stayed pending the Berg v. Chevron trial. During that trial the CAPELLA owners moved to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6). They argued that Robert Connelly's personal representatives, his non-dependent brothers, had no standing to maintain a maritime wrongful death action.

Judge Tanner granted the motion to dismiss. The Connelly estate moved for reconsideration, seeking recovery against Chevron instead. The motion was granted and the court entered a judgment against Chevron for $265,000.00. The judgment was based on the findings of fact and conclusions of law announced in *Berg v. Chevron*. Chevron was given no opportunity to challenge the judgment before it was entered.

## DISCUSSION

Chevron appeals the wrongful death award entered in favor of Robert Connelly's non-dependent brothers, arguing that they lack standing to bring a Jones Act, wrongful death, or survival action. Connelly's claim was brought under both the Jones Act and general maritime law.

### *Jones Act*

[1] The Jones Act allows a seaman to bring an injury or death action against the master of his vessel. 46 U.S.C. § 688(a) (1982). Actions under the Jones Act must apply the statutes governing personal injuries to railroad employees. *Id.*

[2] The Federal Employers Liability Act (FELA) for railroad employees limits the class which may bring wrongful death actions. 45 U.S.C. § 51 (1982). Permissible plaintiffs include "the surviving widow or husband and children of such employee; and, if none, then . . . such employee's parents; and, if none, then . . . the next of kin *dependent upon such employee.*" *Id.* (emphasis added).

None of Connelly's brothers were dependent on him. The Jones Act does not provide standing for non-dependent siblings asserting a wrongful death action. *See Glod v. American President Lines, Ltd.*, 547 F.Supp. 183, 185 (N.D. Cal. 1982). The trial court properly dismissed the Jones Act cause asserted by Connelly against the master of his vessel, the CAPELLA.

*Maritime Wrongful Death*

Chevron and the CAPELLA owners argue that an award for wrongful death under the general maritime law was improper. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402-3, 90 S.Ct. 1772, 1788, 26 L.Ed.2d 339 (1970), established wrongful death actions under the general maritime law. The Court did not define the class of persons who could bring this new action. It left that to other federal courts, suggesting that they look to the Death on the High Seas Act (DOHSA) and to state wrongful death statutes. *Id.* at 408, 90 S.Ct. at 1791.

[3] DOHSA actions may be brought only for the benefit of the decedent's "wife, husband, parent, child, or *dependent relative.*" 46 U.S.C. § 761 (1982) (emphasis added). Siblings must prove their dependency in order to bring a DOHSA action. *Glod*, 547 F.Supp. at 186;

*Muirhead v. Pacific Inland Navigation, Inc.*, 378 F.Supp. 361, 362 (W.D. Wash. 1974). The Alaska wrongful death statute provides damages only "for the benefit of the decedent's spouse and children . . . , or *other dependents.*" Alaska Stat. § 09.55.580(a) (emphasis added).

Two districts in this circuit have considered wrongful death recovery by persons not included in the DOHSA or state schedules of beneficiaries. In *Glod v. American President Lines*, the court followed the guidance suggested in *Moragne* and held that non-dependent siblings could not maintain an action. *Glod*, 547 F.Supp. at 186. Also, a dependent divorced wife could not maintain an action. *In re Petition of ABC Charters, Inc.*, 558 F.Supp. 364, 366-67 (W.D. Wash. 1983).

[4] Recovery for maritime wrongful death would require Connelly's brothers to be dependent relatives. The trial court properly dismissed the wrongful death action against the CAPELLA owners. In light of our reversal in *Berg v. Chevron*, we hold the court erred in entering the wrongful death judgment against Chevron. That judgment is vacated.

*Maritime Survival*

[5] Finally, Connelly contends that the dismissal of the action against the CAPELLA owners was improper because a survival action still could be maintained. While the *Moragne* decision created a uniform federal wrongful death action, it did not create a bar to survival actions in territorial waters. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583, 94 S.Ct. 806, 814, 39 L.Ed.2d 9 (1974).

Evich asserts that DOHSA is the exclusive remedy for maritime death actions, citing *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). This reliance is ill-founded because DOHSA does not apply in territorial waters and because *Higginbotham* did not discuss survival actions, but only wrongful death actions. *Id.* at 622-25, 98 S.Ct. 2013-15. The Fifth Circuit has allowed survival actions to supplement DOHSA actions. *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir., 1984). We agree, and conclude that there is no bar to maritime survival actions based on *Moragne*.

The decisions in *Sea-Land* and *Azzopardi* indicate that Connelly's brothers could maintain a general maritime survival action as his personal representatives. The trial court erred in dismissing Connelly's survival action. The case is remanded for consideration of the survival action against Evich and the Berg estate only.

CONCLUSION

The dismissal of the Jones Act and maritime wrongful death claims are affirmed. The wrongful death judgment entered against Chevron is vacated and remanded. The dismissal of the survival action against Evich and the Berg estate is reversed and remanded.

## APPENDIX D

Applicable Federal Death and Survival Statutes (pertinent provisions):

*The Jones Act:*

46 USCS § 688. *Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in cases of the death of any seaman as a result of any such personal injury, the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

*The Federal Employers' Liability Act:*

45 USCS § 51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees*

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia and any of the

States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 USCS § 59. *Survival of right of action of person injured*

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

*Death on the High Seas Act:*

46 USCS § 761. *Right of action; where and by whom brought*

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 USCS § 762. *Amount and apportionment of recovery*

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

## APPENDIX E

State Survival Statutes (pertinent provisions):

1. *Alabama:*

Code of Ala., Tit. 7, § 150. *Survival of actions and causes of action to and against representative*

. . . all personal actions, except for injuries to the reputation, survive . . . .

2. *Alaska:*

Alaska CCP § 09.55.570. *All causes of action survive*

All causes of action . . . survive. . . .

Alaska CCP § 09.55.580. *Action for wrongful death*

(a) When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefore against the latter . . . and the damages therein shall be . . . fair and just, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving, or other dependents. When the decedent leaves no husband, wife, or children surviving him or her or other dependents, the amount recovered shall be administered as other personal property of the deceased person but shall be limited to pecuniary loss . . . .

3. *Arizona:*

ARS § 14-477. *Action by or against personal representative; survival of causes of action*

Every cause of action, . . . shall survive . . . provided that . . . damages for pain and suffering of such injured person shall not be allowed.

4. *California:*

Prob. C.A. § 573. *Actions by or against executor or administrators; recovery of damages; death of plaintiff before judgment; simultaneous death*

Except as provided in this section no cause of action shall be lost by reason of the death of any person . . .

When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death; including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived, and shall not include damages for pain, suffering or disfigurement . . . .

5. *Colorado:*

CRS § 153-1-9. *What actions survive*

(1) All causes of action . . . shall survive . . . but punitive damages shall not be awarded nor penalties adjudged after the death of the person against whom such punitive damages or penalties are claimed; and, in tort actions based upon personal injury, the damages recoverable after the death of the person in whose favor such action has accrued shall be limited to loss of earnings and expenses sustained or incurred prior to death, and shall not include damages for pain, suffering or disfigurement, nor prospective profits or earnings after date of death . . . .

6. *Connecticut:*

Gen Stats § 52-555. *Actions for injuries resulting in death*

In any action surviving . . . injuries resulting in death . . . administrator may recover from the party legally at fault for such injuries just damages together with the cost of reasonably necessary medical, hospital and nursing services, and including funeral expenses . . . .

Gen Stats § 52-599. *Survival actions and causes of action*

No cause or right of action shall be lost or destroyed by the death of any person, but it shall survive . . . .

7. *Delaware:*

10 Del.C. § 3701. *Causes of action generally*

All causes of action . . . shall survive . . . .

8. *District of Columbia:*

D.C. Code § 12-101. *Survival of rights of action*

On the death of a person in whose favor or against whom a right of action has accrued for any cause prior to his death, the right of action survives . . . In tort actions for personal injuries, the right of action is limited to damages for physical injury, excluding pain and suffering resulting therefrom.

9. *Florida:*

Fla Stats § 768.19. *Right of action*

When the death of a person is caused by the wrongful act . . . of any person, . . . the person or watercraft that would have been liable in damages if death had not ensued shall be liable for damages . . . .

Fla Stats § 768.21. *Damages*

. . . Damages may be awarded as follows:

. . . (6) The decedent's personal representative may recover from the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors . . . If the decedent's survivors include a surviving spouse or lineal descendants, lass of net accumulations beyond death and reduced to present value may also be recoverable.

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate . . . .

10. *Georgia:*

Ga Code § 3-505. *Action for tort and certain causes of action not to abate by death of either party*

. . . nor shall any action, or cause of action, for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall . . . survive . . . .

Ga Code § 105-1309. *Recovery by administrator of decedent*

. . . the administrator or executor of the decedent may sue for and recover and hold the amount recovered for the benefit of the next of kin, if dependent upon the decedent, or to whose support the decedent contributed . . . the amount of the recovery shall be determined by the extent

of the dependency or the pecuniary loss sustained by the next of kin.

Ga Code § 105-1310. *Recovery of funeral, medical and other expenses*

. . . the personal representative . . . shall be entitled to recover for the funeral, medical, and other necessary expenses resulting from the injury and death of the deceased person.

11. *Hawaii:*

Haw Stats § 663-7. *Survival of cause of action*

A cause of action arising out of a wrongful act, neglect, or default . . . shall not be extinguished by reason of the death of the injured person. The cause of action shall survive . . . and any damages recovered shall form part of the estate of the deceased.

Haw Stats § 663-8. *Damages, future earnings*

Together with other damages which may be recovered by law, the legal representative of the deceased person may recover where applicable under section 663-7 the future earnings of the decedent in excess of the probable cost of the decedent's own maintenance and the provision decedent would have made for his or her actual or probable family and dependents during the period of time decedent would have likely lived but for the accident.

12. *Idaho:*

ICA § 5-327. *Personal injuries—Property damage—Death of wrongdoer—Survival of action*

Causes of action arising out of injury to the person, or death, caused by the wrongful act or negligence of another,

. . . shall not abate upon the death of the wrongdoer, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded . . . .

13. *Illinois:*

Ill Rev Stats c 70 § 1. *Action for damages*

Whenever the death of a person shall be caused by wrongful act, neglect or default, . . . the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured . . . .

Ill Rev Stats c 70 § 2,

. . . Where the deceased person left no surviving spouse or next of kin entitled to recovery, the damages shall, subject to the following limitations inure, to the exclusive benefit of the following persons, or any one or more of them:

(a) to the person or persons furnishing hospitalization or hospital services in connection with the last illness or injury of the deceased person, not exceeding $450.00;

(b) to the person or persons furnishing medical or surgical services in connection with such last illness or injury, not exceeding $450.00;

(c) to the personal representative, as such, for the cost and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee . . . .

14. *Indiana:*

Ind Stats § 34-1-1-1. *All actions survive—Exception—Continuance of actions—Damages*

. . . actions for personal injuries to the deceased party, . . . survive only to the extent provided herein . . . provided, however, That when a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies . . . the personal representative of said injured person shall be permitted to recover only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death.

15. *Iowa:*

Ia Code § 611.20. *Actions survive*

All causes of action shall survive . . . .

Ia Code § 633.336. *Damages for wrongful death*

When a wrongful act produces death, damages recovered therefor shall be disposed of as personal property belonging to the estate of the deceased . . . .

16. *Kansas:*

KSA § 60-1801. *Survival of actions; What causes of action survive*

. . . causes of action . . . for injury to the person . . . survive . . . .

KSA § 60-1903. *Amount of damages*

In any such action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages cannot exceed in the

aggregate the sum of twenty-five thousand dollars ($25,000.00) and costs.

17. *Kentucky:*

KRS § 411.140. *What actions shall survive*

No right of action for personal injury . . . shall cease or die with the person injuring or injured . . . .

18. *Louisiana:*

LSA Art. 2315. *Liability for acts causing damage; survival of action*

. . . The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child or parent surviving . . . .

19. *Maine:*

Me RS Tit 18 § 2501. *Actions which survive*

No personal action or cause of action shall be lost by the death of either party, but the same shall survive . . . .

Probate Code Tit 18-A § 2-804. *Actions for wrongful death* as follows:

(a) Whenever the death of a person shall be caused by a wrongful act, neglect or default, . . . the person

or the corporation that would have been liable if death had not ensued shall be liable for damages . . .

(b) the jury may give such damages as it shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the persons for whose benefit the action is brought, and in addition thereto shall give such damages as will compensate the estate of the deceased person for reasonable expenses of medical, surgical and hospital care and treatment and for reasonable funeral expenses and in addition thereto may give damages not exceeding $10,000.00 for the loss of comfort, society and companionship of the deceased . . .

(c) Whenever death ensues following a period of conscious suffering, . . . the person who caused the personal injuries resulting in such conscious suffering and death shall, in addition to the action at common law and damages recoverable therein, be liable in damages . . . .

20. *Maryland:*

Md Code Art 93 § 112. *What actions may be brought by and against executors and administrators*

Executors and administrators shall have full power to commence and prosecute any personal action whatever, . . . which the testator or intestate might have commenced and prosecuted, . . . provided, that if the death of the testator or intestate shall have resulted from the wrong for which any such personal action might have been commenced, then the executor or administrator shall be entitled to recover the funeral expenses of said testator or intestate, not to exceed, however, the sum of one thousand dollars ($1,000.00) in addition to any other damages recoverable in such actions . . . .

21. *Massachusetts:*

GL c 228 § 1. *Actions Which Survive*

In addition to the actions which survive by the common law, the following shall survive:

. . . (2) Actions of tort (a) for assault, battery, imprisonment or other damage to the person; (b) for consequential damages arising out of injury to the person and consisting of expenses incurred by a husband, wife, parent or guardian for medical, nursing, hospital or surgical services . . . .

22. *Michigan:*

CL § 27A.2921. *Survival of actions; actions and claims resulting in death*

All actions and claims survive death. Actions on claims for injuries which result in death shall not be prosecuted after the death of the injured person except pursuant to the next section . . . .

CL § 27A.2922. *Death by wrongful act; actions to be brought only under this section; persons to sue; damages; judgment, certification to probate court; distribution*

Sec 2922

(a) Whenever the death of a person or injuries resulting in death, shall be caused by wrongful act, neglect or default . . . the person . . . which would have been liable, . . . shall be liable to an action for damages . . . (2) . . . in every such action the court or jury may give such damages, as, the court or jury, shall deem fair and just, . . . including damages for the reasonable medical, hospital, funeral and burial expenses for which the estate is liable and reasonable

compensation for the pain and suffering, while conscious, undergone by such deceased person during the period intervening between the time of the inflicting of such injuries and his death. The amount of damages recoverable by civil action for death caused by the wrongful act, neglect or fault of another may also include recovery for the loss of society and companionship of the deceased. Such person or persons entitled to such damages shall be of that class who, by law, would be entitled to inherit the personal property of the deceased had he died intestate . . . .

23. *Minnesota:*

Minn Stats § 573.01. *Survival of causes*

A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in section 573.02 . . .

Minn Stats § 573.02, has been amended as follows:

Subdivision 1. When death is caused by the wrongful act or omission of any person or corporation, the trustee appointed as provided in subdivision 3 may maintain an action therefor if the decedent might have maintained an action, had he lived, for an injury caused by the wrongful act or omission . . . The recovery in the action is the amount the jury deems fair and just in reference to the pecuniary loss resulting from the death, and shall be for the exclusive benefit of the surviving spouse and next of kin, proportionate to the pecuniary loss severally suffered by the death.

24. *Mississippi:*

Miss Code § 91-7-233. *What actions survive to executor*

Executors, administrators, and temporary administrators may commence and prosecute any personal action

whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted . . . .

Miss Code § 11-7-13. *Actions for injuries producing death*

Whenever the death of any person shall be caused by any real wrongful or negligent act or omission . . . the person or corporation, or both that would have been liable if death had not ensued, . . . shall be liable for damages, . . . in such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit . . . .

25. *Missouri:*

RS Mo § 537.020. *Actions for personal injuries or death not to abate by reason of death*

. . . Causes of action for death shall not abate by reason of the death of any party to any such cause of action, but shall survive to the personal representative of such party bringing such cause of action and against the person, receiver or corporation liable for such death and his or its legal representatives . . . .

RS Mo § 537.090. *Damages to be determined by jury-factors to be considered*

In every action brought under section 537.080 . . . the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued . . . .

26. *Montana:*

RCM § 93.2810. *When representative may sue for death of one caused by the wrongful act of another*

When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death . . . such damages may be given as under all the circumstances of the case may be just.

27. *Nebraska:*

Neb RS § 30.809. *Action for wrongful death; creation*

Whenever the death of a person shall be caused by the wrongful act, neglect or default . . . then, . . . the person who, or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, . . . .

28. *Nevada:*

NRS § 41.100. *Cause of action not lost by reason of death; damages; subrogation*

1. Except as provided in this section, no cause of action is lost by reason of the death of any person, but may be maintained by or against his executor or administrator . . .

3. Except as provided in this subsection, when a person who has a cause of action dies before judgment, the damages recoverable by his executor or administrator include all losses or damages which the decedent incurred or sustained before his death, including any penalties or

punitive and exemplary damages which the decedent would have recovered if he had lived, and damages for pain, suffering or disfigurement and loss of probable support, companionship, society, comfort and consortium. This subsection does not apply to the cause of action of a decedent brought by his personal representatives for his wrongful death . . . .

29. *New Hampshire:*

HR Rev Stats § 556.9. *Survival of Tort Actions*

Actions of tort for physical injuries to the person, . . . shall survive . . . .

NH Rev. Stats § 556.12. *Damages for Wrongful Death, Elements*

If the administrator of the deceased party is plaintiff, . . . the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damages . . . .

NH Rev. Stats § 556.13. *Limitation of Recovery*

The damages recoverable in such an action shall not exceed fifty thousand dollars except in cases where the plaintiff's decedent has left either a widow, widower, child, father, mother, or any relative dependent on the plaintiff's decedent in which event there shall be no limitation . . . .

30. *New Jersey:*

NJ Stats § 2A:15-3. *Actions which survive; torts to decedent*

Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser . . . .

NJ Stats § 2A:31-5. *Assessment of damages by jury*

. . . the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased . . . .

31. *New Mexico:*

NM Stats 41-2-1. *Death by wrongful act or neglect—Liability in damages*

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, . . . the person who or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages . . . .

NM Stats 41-2-3. *Personal representative to bring action—Damages—Distribution of proceeds of judgment*

. . . the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just . . . .

32. *New York:*

§ 11-3.2. *Action for injury to person or property survives despite death of person in whose favor or against whom cause of action existed*

. . . (b) Action by personal representative for injury to person or property. No cause of action for injury

to person or property is lost because of the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent, but punitive damages shall not be awarded . . . .

NY EPTL § 11-3.3. *Limitations upon recovery where injury causes death*

(a) . . . the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death, except . . . the reasonable funeral expenses of the decedent . . . .

33. *North Carolina:*

GS § 28-173. *Death by wrongful act; recovery not assets; dying declarations*

When the death of a person is caused by a wrongful act, neglect or default of another . . . the person or corporation that would have been . . . liable . . . shall be liable to an action for damages . . . The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars ($500.00) incident to the injury resulting in death . . . .

GS § 28-174. *Damages recoverable for death by wrongful act; evidence of damages*

(a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance . . .

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, . . . .

34. *Ohio:*

Ohio RC § 2305.21. *Survival of actions*

. . . causes of action for . . . injuries to the person or property, . . . shall survive, . . . .

35. *Oklahoma:*

Okla Stats 12 § 1051. *Causes of action that survive*

. . . causes of action . . . for an injury to the person . . . shall also survive . . . .

§ 1053. *Wrongful death—Limitation of actions—Damages*

A. When the death of one is caused by the wrongful act or omission of another, the personal representative

of the former may maintain an action therefor against the latter, . . .

B. The damages recoverable in actions for wrongful death as provided in this section shall include the following:

Medical and burial expenses . . .

The loss of consortium and the grief of the surviving spouse, . . .

The mental pain and anguish suffered by the decedent, which shall be distributed to the surviving spouse and children, if any, or next of kin . . .

The pecuniary loss of the survivors . . .

The grief and loss of companionship of the children and parents of the decedent . . .

punitive or exemplary damages may also be recovered . . . .

36. *Oregon:*

ORS § 30.075. *Death of injured person*

(1) Causes of action arising out of injuries to a person, caused by the wrongful act or omission of another, shall not abate upon the death of the injured person, and the personal representatives of the decedent may maintain an action against the wrongdoer, . . . Damages recoverable . . . shall not exceed $25,000, and shall be limited to reasonable expenses paid or incurred for doctor, hospital or nursing services for the deceased and for his loss of earnings . . . .

37. *Pennsylvania:*

12 PS § 1601. *Action may be brought after death of party injured*

Whenever death shall be occasioned by unlawful violence or negligence, . . . the widow of any such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned.

12 PS § 1602. *Persons entitled to maintain action for injuries causing death—Recovery of reasonable hospital, nursing, medical, and funeral expenses and administration expenses*

The persons entitled to recover damages for any injuries causing death shall be the husband, widow, children or parents of the deceased, and no other relatives . . . If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death.

38. *Puerto Rico:*

32 LPRA § 311. *Action for death of person not a minor; damages*

When the death of a person . . . is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages . . . as under all the circumstances of the case may be just.

39. *Rhode Island:*

RI GL § 9-1-6. *Causes of actions surviving death of parties*

. . . the following causes of action or actions shall also survive . . .

Third. Causes of action and actions of trespass and trespass on the case for damages to the person or to real and personal estate.

40. *South Carolina:*

SC Code § 10-209. *Survival of right of action*

Causes of action for . . . all injuries to the person or to personal property shall survive . . . .

41. *South Dakota:*

SD Stats § 21-5-1. *Liability for wrongful death where damages for injury could have been recovered*

Whenever the death or injury of a person shall be caused by a wrongful act, neglect, or default, . . . the corporation which, or the person who, would have been liable, . . . shall be liable, to an action for damages . . . .

SD Stats § 21-5-7. *Damages proportionate to pecuniary injury to beneficiaries*

. . . the jury may give such damages as they may think proportionate to the pecuniary injury resulting from such death to the persons respectively for whose benefit such action shall be brought.

1939 SD Stats § 15-4-1. *Actions survive brought by or against legal representatives*

All causes of action shall survive . . . .

42. *Tennessee:*

Tenn Code § 20-5-106(a)

The right of action which a person, who dies from injuries received from another . . . shall not abate or be extinguished by his death . . . .

Tenn Code § 20-614. *Damages recoverable in wrongful death*

Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, as provided for by 20-5-106(a), the party suing shall . . . have the right to recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

42. *Texas:*

Tex Ann Civ St art 4671. *Cause of action*

. . . 1. When an injury causing death of any person is caused by . . . wrongful act, neglect, . . . (the person causing the injury) shall be liable in damages . . . .

Tex Ann Civ St art 5525. *Survival of cause of action*

All causes of action upon which suit . . . may hereafter be brought for personal injuries, or for injuries resulting in death, . . . shall not abate by reason of . . . the death of such injured person . . . .

44. *Utah:*

Utah Code § 78-11-12. *Injury to person or death—No abatement of cause of action upon death of wrongdoer or*

*injured person—Action against personal representative of wrongdoer—Evidence required*

Causes of action arising out of physical injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer or the injured person . . . .

45. *Vermont:*

VSA § 1452. *Actions for bodily hurt survive, when*

In an action for the recovery of damages for a bodily hurt or injury, occasioned to the plaintiff by the act or default of the defendant or defendants, if either party dies during the pendency of such action, the action shall survive . . . .

VSA § 1453. *Survival of causes of action*

The causes of action mentioned in sections 1451 and 1452 of this title shall survive . . . .

46. *Virginia:*

Va Code § 8.01-25. *Survival of causes of action*

Every cause of action . . . shall survive . . . punitive damages shall not be awarded after the death of the party liable for the injury. Provided, further, that if the cause of action asserted by the decedent in his lifetime was for a personal injury and such decedent dies as a result of the injury complained of with a timely action for damages arising from such injury pending, the action shall be amended in accordance with the provisions of § 8.01-56 . . . (to become one for wrongful death) . . . .

47. *Virgin Islands:*

VI ch. 5 § 76. *Actions for wrongful death*

(c) When the death of a person is caused by the wrongful act, negligence, default . . . the person . . . that would have been liable in damages if death had not ensued shall be liable for damages . . . .

Parties

(d) The action shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this section, caused by the injury resulting in death. When a personal injury to the decedent results in his death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate . . . .

Damages

. . . (6) The decedent's personal representative may recover for the decedent's estate the following:

(a) Loss of earnings of the deceased from the date of injury to the date of death, less lost support of survivors excluding contributions in kind, with interest . . .

(b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against his estate or that were paid by or on behalf of decedent . . . .

48. *Washington :*

RCWA § 4.20.046. *Survival of actions—Death of tort feasor*

(1) All causes of action by a person or persons against another person or persons shall survive to the per-

sonal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this action: *Provided, however,* That no personal representative shall be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by the deceased.

49. *West Virginia:*

W Va Code § 5477(1). *Which Actions Survive; Limitations; Which Law Governs*

(a) . . . causes of action for injuries to property, real or personal, or injuries to the person and not resulting in death, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled to recover or the death of the person liable . . . .

50. *Wisconsin:*

WSA § 895.03. *Recovery for death by wrongful act*

Whenever the death of a person shall be caused by a wrongful act, neglect or default . . . the person who, or the corporation which, would have been liable . . . shall be liable to an action for damages . . . .

WSA § 287.01. *Tort actions on surviving causes*

If the cause of action survives under ch. 895, the executors or administrators may maintain an action thereon against the wrongdoer.

51. *Wyoming:*

Wyo Stats § 1-4-101. *Causes of action that survive*

. . . causes of action . . . for injuries to the person . . . shall also survive; and the action may be brought notwithstanding the death of the person entitled or liable to the same, provided that in actions for personal injury damages, if the person otherwise entitled thereto, dies, recovering shall be limited to damages for wrongful death.

Supreme Court, U.S.
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No. 87-338

In The
# Supreme Court of the United States
October Term, 1987

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PETER EVICH; ESTATE OF OGIE BERG,
*Petitioners,*
v.
TERRY MORRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. CONNELLY, et al.,
*Respondents.*

—o—

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

—o—

## RESPONDENT'S BRIEF IN OPPOSITION

—o—

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No. 87-338

In The

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October Term, 1987

PETER EVICH; ESTATE OF OGIE BERG,

*Petitioners,*

v.

TERRY MORRIS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. CONNELLY, et al.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## RESPONDENT'S BRIEF IN OPPOSITION

Respondents Terry Morris and John J. Connelly, respectfully request this Court to deny the Petition for Writ of Certiorari seeking review of the opinion of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 819 F.2d 256.

## STATEMENT OF THE CASE

Respondents' decedent, Robert J. Connelly, died on or about March 29, 1980 as a result of a maritime casualty in Alaska territorial waters. He was survived by three non-dependent brothers. Various actions, including this one, were consolidated for trial in the Western District of Washington. Initially, the district court denied recovery against petitioners. On appeal, the Ninth Circuit Court of Appeals reversed, joining other circuits in recognizing a general maritime survival action, and remanded for a determination of damages. *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985).

On remand, the district court awarded respondents recovery for the decedent's pre-death pain and suffering, together with funeral expenses, but denied recovery for loss of future earnings, despite having awarded these damages against another defendant in the earlier action. (That defendant was subsequently dismissed, *Berg v. Chevron*, 759 F.2d 1425 (9th Cir. 1985).) The Ninth Circuit again reversed, holding, *inter alia*, that the decedent's future earnings were properly recoverable in such an action. *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987).

———o———

## REASONS WHY THE WRIT SHOULD BE DENIED

### 1. The Court of Appeals Fully Considered the Issue and Correctly Decided the Case.

The harsh common law rule that a cause of action for personal injury abated upon the death of the plaintiff or defendant has been universally remedied in this country through the enactment of survival and/or revival statutes. Minzer, *Damages in Tort Actions*, § 20.10, p. 20-31 (1982). The harsher common law rule that the killing of a human being did not constitute a tort has been similarly remedied. *Id.* In *Moragne v. States Marine Lines*, 398 U.S. 375, 395, 26 L.Ed.2d 339, 90 S.Ct. 1772 (1970), this Court decided that these antiquated common law concepts would not apply under the general maritime law, noting that

> within territorial waters, identical conduct violating federal law (here the furnishing of an unseaworthy vessel) produces liability if the victim is merely injured, but frequently not if he is killed. As we have concluded, such a distinction is not compatible with the general policies of federal maritime law.

The court below, relying on *Moragne*, noted that allowing future economic loss to be recovered in survival actions ". . . prevents the anomaly of rewarding a petitioner for killing his victim rather than injuring him." *Evich v. Morris*, *supra* at 258. Petitioners now ask this Court to allow them to retain this anomalous "reward." The court of appeals properly concluded that such a position was not compatible with the fundamental principles of federal maritime law, nor with the remedial object of wrongful death and survival actions.

### a. Recovery for Future Earnings Comports with the Underlying Theory of a Survival Action.

A survival action simply saves the decedent's cause of action for personal injuries. Loss of future earnings commonly is an element of damages in a personal injury action. Upon the death of the plaintiff, logic dictates that this element of his or her claim should survive:

> A permanent loss of earning power is usually the chief economic harm caused by a permanent injury. If [plaintiff] in his lifetime had recovered judgment in his action, his damages would have included an allowance for prospective loss of earnings during his normal life expectancy, discounted to present worth, and with such other adjustments as the facts may require. When he died, his right to these damages passed under the Survival Act to his administratrix, the present appellant, for the Act provides that the injured person's right of action for physical injury "shall survive" . . . .

*Hudson v. Lazarus*, 217 F.2d 344, 348 (D.C. Cir. 1954); *see also: Criscuola v. Andrews*, 82 Wn.2d 68, 507 P.2d 149 (1973); *Runyon v. District of Columbia*, 463 F.2d 1319 (D.C. Cir. 1972); *Incollingo v. Ewing*, 444 Pa. 263, 444 Pa. 299, 282 A.2d 206 (1971); *Osborne v. Russell*, 669 P.2d 550 (Ak. 1983).

As Minzer, *supra* at 21-33 notes,

> [c]learly, if the victims had survived, recovery could have been had for [future earnings], so that interpreted literally, most survival acts would appear to provide such coverage. At noted, however, the danger of double recovery has caused most jurisdictions to reach a contrary conclusion.

**b. Potential Double Recovery Problems Can Be Prevented by More Appropriate Measures.**

Petitioners primarily rely upon a procedural rule of convenience that "post-mortem earnings are not recoverable under a majority of state survival statutes . . . . " This rule, however, is fashioned solely to prevent a double recovery of the decedent's future earnings in both a survival action and a collateral wrongful death action.[1] Respondents submit that the possibility of a double recovery (which does not exist in this case) does not afford a principled basis for categorically denying recovery of future economic loss that was clearly occasioned by a defendant's tortious conduct. A federal court is fully able to deal equitably with such issues on a case-by-case basis. As this Court noted in a like vein when rejecting a similar argument in *Sea-Land Services v. Gaudet*, 414 U.S. 573, 592, 39 L.Ed.2d 9, 94 S.Ct. 806 (1974),

> [a]ny potential for such double liability can be eliminated by the application of familiar principles of collateral estoppel to preclude a decedent's dependents from attempting to relitigate the issue of the support due from the decedent's future wages.

Many states have also dealt with this potential problem in a more considered fashion:

> The jurisdictions which permit recovery for loss of future earnings in the survival action have negated

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1. "The majority of jurisdictions allow the plaintiff in a survival action to recover damages for the decedent's lost earnings, but limit the recovery to earnings between the time of injury and the time of death. Probable earnings after death are not recoverable because of the danger of double recovery, as the decedent's future earnings are often considered in a related wrongful death action." Minzer, *supra*, § 21.20, pp. 21-29.

> the double recovery problem by tailoring the measure of damages to reflect the amounts recoverable under the wrongful death statute.

Minzer, *supra*, § 21.22, p. 21-34. *See, e.g., Criscuola v. Andrews, supra; Runyon v. District of Columbia, supra.* These jurisdictions have not had any difficulty in dealing with the so-called "conflict of prioritization" problem referenced by petitioners. This is not surprising for, indeed, petitioners do not submit any convincing argument that any such "dilemma" will result.

Petitioners' reference to alleged problems of uniformity in maritime law is also void of any substantive content. No other federal appellate court since *Moragne* has ruled that future ecnomic loss is *not* recoverable in a maritime survival action; hence, uniformity is not in issue. Should another circuit, in the future, reach a contrary conclusion, the goal of uniformity in maritime law might conceivably present a basis for review. However, at this juncture, without any apparent conflict or controversy, the issue is not sufficiently "ripe" to justify consideration by this Court.

Petitioners' assertion that respondents seek a "windfall" is a paradox in view of the pertinent authorities, which have consistently noted that it is the *tortfeasor* who reaps the "windfall" when recovery of future economic loss is categorically denied:

> Some courts and commentators have recognized that the refusal of the courts to allow for the recovery in a survival action of any of the decedent's lost future earnings may prevent a double recovery, but may also result in a windfall to the wrongdoer. Thus, it has been pointed out that even if a decedent's prospective future earnings are reduced by his personal mainte-

> nance costs and by the portion of such earnings which he would contribute to those persons entitled to recover under the wrongful death statute, there may still be some earnings left over. These excess earnings, it has been argued, should be recoverable in a survival action maintained for the benefit of the decedent's estate. Accordingly, numerous courts, although not specifically referring to this argument, have held that, even where an action is maintainable under the wrongful death action, a decedent's lost future earnings can be recovered in a survival action.

76 A.L.R.3d 125, 131.[2]

**c. Where No Wrongful Death Action Exists, Any Concerns Regarding Double Recovery Cease to Exist.**

The author of the Annotation appearing at 76 A.L.R.3d 125, 130[3] notes that

> [w]here an action is not maintainable under the wrongful death statute, the danger of a double recovery is removed and, accordingly, in this situation, the courts have allowed the decedent's personal representative to recover in a survival action for the decedent's lost future earnings.

*See, e.g., Kyes v. Valley Tel. Co.*, 132 Mich. 281, 93 N.W. 623 (1903); *Kriesak v. Crowe*, 36 F. Supp. 127 (M.D. Pa. 1940).

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2. Annotation: Recovery, in Action for Benefit of Decedent's Estate in Jurisdiction Which Has Both Wrongful Death and Survival Statutes, of Value of Earnings Decedent Would Have Made After Death, 1977.

3. See fn. 2.

### 2. The Issue Presented By the Petition Does Not Warrant Review at This Time.

Petitioners suggest that this case is in conflict with *In re Cambria S.S. Co.*, 505 F.2d 517 (6th Cir. 1974), *cert. denied*, 430 U.S. 975 (1975). *In re Cambria*, however, is a wrongful death action. While the Sixth Circuit considered similar issues it did not do so in the context of a *survival* action. Consequently, that decision has questionable relevance to the issue of what elements of damages are recoverable in a maritime survival action. *In re Cambria* certainly has not created a conflict among the circuits.

The Third Circuit, in *Mascuilli v. United States*, 411 F.2d 867 (3d Cir. 1969), decided prior to *Moragne*, allowed recovery of future earnings in an action "saved" by the Pennsylvania Survival Act. The court there noted that the elements of damages were governed by federal maritime law and apparently regarded plaintiff's right to recover lost future earnings as being so basic as not even to call for comment.

In *Muirhead v. Pacific Inland Navigation, Inc.*, 378 F. Supp. 361 (W.D. Wash. 1974), the district court, relying upon *Moragne*, specifically allowed recovery of future economic loss in a maritime survival action.

In short, this is the only post-*Moragne* federal appellate case to have addressed this specific issue. Respondents submit it does not have the potential national import to warrant review until there is further "sifting" as contemplated by *Moragne*. Accordingly, issuance of the writ at this time would be premature.

### 3. The Petition for Writ of Certiorari Presents Only One Question; Not Two As Stated by Petitioners.

Concisely stated, respondents understand the petition for certiorari to state two questions:

(1) Does a survival action exist under general maritime law? and

(2) Is post-mortem economic loss an element of damages in such an action?

As to the first question, respondents submit that the circuit courts uniformly recognize a maritime survival action[4] and, accordingly, review on writ of certiorari on this basis is not warranted. Supreme Court Rule 17.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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4. *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985); *Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794 (1st Cir. 1974); *Spiller v. Thomas M. Lowe, Jr. & Assoc.*, 446 F.2d 903 (8th Cir. 1972); *Greene v. Vantage S.S. Co.*, 466 F.2d 159 (4th Cir. 1972); *Ward v. Union Barge Line Corp.*, 443 F.2d 565 (3d Cir. 1971).